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Ex Parte Presentation

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., TW-A325
Washington, DC 20554

**Re: CC Docket No. 96-128, Illinois Public Telecommunications Association,
Petition for Declaratory Ruling**

Dear Ms. Dortch:

On February 22, 2005, Albert H. Kramer and Robert F. Aldrich of Dickstein Shapiro Morin & Oshinsky, on behalf of the American Public Communications Council ("APCC"), met with Dana Shaffer, advisor to Commissioner Deborah Tate. We discussed the matters summarized in the attached documents, which were previously submitted in this docket.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich". The signature is fluid and cursive, with the first name "Robert" and last name "Aldrich" clearly distinguishable.

Robert F. Aldrich

Enclosure

cc: Dana Shaffer

AMERICAN PUBLIC COMMUNICATIONS COUNCIL

WHY THE COMMISSION SHOULD ISSUE A RULING ON WHETHER PSPs ARE ENTITLED TO REFUNDS OF PAYPHONE LINE CHARGES PAID IN EXCESS OF LEVELS THAT COMPLY WITH THE NEW SERVICES TEST

December 22, 2005

- Beginning in August 2004, three state payphone associations filed petitions requesting the Commission to issue a ruling that the Bell Operating Companies ("BOCs") must refund intrastate payphone line charges collected in excess of the levels found to comply with the Commission's "new services test" ("NST") ratemaking standard.

I. BACKGROUND

- In the 1996 Payphone Orders, the Commission implemented the mandate of 47 U.S.C. § 276 to promote payphone competition and prevent the BOCs from discriminating in favor of their own payphone services. Among other things, the Commission required BOCs' state-tariffed charges for payphone lines to comply with the NST. While it left implementation of the NST to state commissions, the Commission made it clear that failure to comply with the NST would violate federal law. As a further incentive, the Commission made compliance with the NST a condition precedent to the BOCs becoming eligible to receive dial-around compensation for their own payphones.
- In April 1997, only days before the April 15, 1997, deadline, the BOCs informed the Commission that they did not initially understand that intrastate payphone line charges had to comply with the NST in order for BOC payphones to become eligible for payphone compensation. To allow them to collect payphone compensation pending compliance with the NST, the BOCs requested and the Commission granted a temporary waiver of the NST condition. As a condition of the waiver, the BOCs pledged and the Commission required that, once NST-compliant rates took effect, the BOCs would refund to PSPs all charges back to April 15, 1997, in excess of NST-compliant levels.
- Subsequently, despite what APCC believes to be the clear language of the FCC's April 1997 order, the BOCs resisted providing refunds. State public service commissions have issued divergent decisions on whether BOCs must refund payphone line charges applied in excess of NST compliant rates.

II. WHY THE COMMISSION SHOULD RULE ON THE PETITIONS NOW

- *There are currently pending refund proceedings affecting at least 19 states.* Currently, courts in five states and public service commissions in three states are considering the refund issue. One state commission, Oregon, is holding proceedings in abeyance and has written the Chairman to request Commission guidance on the correct interpretation of the Commission's rulings. In addition, the refund issue is pending in a case before the U.S. Ninth Circuit court of appeals involving 11 states in Qwest's service territory. A timely Commission ruling issued before final rulings in those cases would ensure that the pending cases are resolved consistently and correctly.
- *The refund issue is a matter of federal law.* The state proceedings raise common issues of federal law that should be resolved by the Commission. To date, at least six state commissions and two state courts have ruled in favor of refunds, while at least seven state commissions and two state courts have ruled against refunds. Most of the state rulings have been issued in the last few years. With the states about evenly split on the refund issue, it is clear that some states have interpreted the *Payphone Orders* incorrectly. Federal agencies need not defer to erroneous state agency or court decisions on matters of federal law. Without a federal ruling, the states will continue to inconsistently interpret and apply the FCC's rules and orders.
- *Clarifying the Commission's Payphone Orders will promote uniform application of the orders and help resolve pending state proceedings.* For example, in 2002, after state commissions had adopted disparate interpretations of the NST, the Commission issued a ruling that clarified the meaning and application of the NST in order to "assist states in applying the [NST] to BOCs' intrastate payphone line rates." After the Commission issued the 2002 order, many states ordered (or approved settlements for) major reductions in the BOCs' payphone line rates.
- *APCC believes it is necessary for the Commission to defend the integrity of its processes.* To secure a waiver enabling them to collect lucrative dial-around compensation revenue, the BOCs pledged to refund payphone line charges in excess of NST-compliant rates. The Commission should make clear that carriers must deliver when they make promises to the Commission in exchange for regulatory benefits.
- *Millions of dollars are at stake.* A ruling on refunds could result in a major infusion of revenue needed to maintain payphones as a critical piece of the national communications infrastructure.

**PENDING PROCEEDINGS AND PRIOR DECISIONS ON REFUNDING BOC
PAYPHONE LINE CHARGES IN EXCESS OF NEW SERVICES TEST-COMPLIANT
LEVELS**

I. PENDING NST REFUND PROCEEDINGS

A. State Commissions

- Public Utility Commission of Oregon, *Northwest Public Communications Council v. Qwest Corporation*, Dkt. No. DR 26/UC 600, Ruling (ALJ March 23, 2005) *aff'd* Order (PUCO May 3, 2005).
- Public Service Commission of Wisconsin, *Investigation of the Access Line Rates of Wisconsin Bell, Inc., d/b/a SBC Wisconsin, that Apply to Private Payphone Providers*, Dkt. No. 6720-TR-108, Interlocutory Order and Amended Notice of Proceeding (June 15, 2005)
- Missouri Public Service Commission, *Tari Christ et al. v. Southwestern Bell Telephone Company*, Case No. TC-2005-0067 (filed September 15, 2004)

B. State Courts

- *Illinois Public Telecommunications Association v. Illinois Commerce Commission*, No. 04-0225 (App. Ct. Ill., 1st Dist., petition for rehearing pending).
- *New England Public Communications Council v. Dept. of Telecommunications and Energy*, No. SJ-2004-0327 (Mass. Sup. Jud. Ct., filed July 23, 2004)
- *Michigan Bell Telephone Company, Inc. d/b/a SBC Michigan, et al. v. Michigan Public Service Commission, et al.*, Case Nos. 254980, 261341 (Mich. Ct. App.)
- *Payphone Association of Ohio v. The Public Utilities Commission of Ohio*, No. 2004-2128 (Sup. Ct. Ohio, filed Dec. 27, 2004)

C. Federal Courts

- *Davel Communications, Inc., et al. v. Qwest Corporation*, No. 04-35677 (9th Cir., filed Aug. 2, 2004) (involving 11 states served by Qwest)
- *Southern Public Communication Association v. Mississippi Public Service Commission and BellSouth Telecommunications, Inc.*, C.A. No. 3:04-cv-881 (S.D. Miss.)

II. PRIOR DECISIONS

A. State Commissions

1. Refunds granted

- Kentucky Public Service Commission, *Deregulation of Local Exchange Companies' Payphone Service*, Case No. 361, Order (January 5, 1999), Order (May 1, 2003)
- Public Service Commission of South Carolina, *Request of BellSouth Telecommunications, Inc. for Approval of Revisions to Its General Subscriber Service Tariff and Access Service to Comply with the FCC's Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Docket No. 97-124-C, Order Setting Rates for Payphone Lines and Associated Features (Order No. 1999-285, April 19, 1999)
- Indiana Utility Regulatory Commission, *Request of the Indiana Payphone Association for the Commission to Conduct an Investigation of Local Exchange Company Pay Telephone Tariffs for Compliance with Federal Regulations, and to Hold Such Tariffs in Abeyance Pending Completion of Such Proceeding*, Cause No. 40830, Final Order (October 6, 1999), Order on Less Than All of the Issues (September 6, 2000)
- Tennessee Regulatory Authority, *All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service As Required by Federal Communications Commission (FCC) Docket 96-128*, Docket No. 97-00409, Interim Order (February 1, 2001)
- Michigan Public Service Commission, *Michigan Pay Telephone Association v. Ameritech Michigan and GTE North Incorporated*, Case No. U-11756 (after remand), Opinion and Order, 2004 Mich. PSC LEXIS 65 (March 16, 2004) (partial grant)
- Alabama Public Service Commission, *Southern Public Communication Association v. BellSouth Telecommunications, Inc.*, Dkt. No. 29172, Order (June 14, 2004)

2. Refunds denied

- Illinois Commerce Commission, *Investigation into Certain Payphone Issues as Directed in Docket 97-0225*, ICC Docket No. 98-1095, Interim Order (November 12, 2003)
- Michigan Public Service Commission, *Michigan Pay Telephone Association v. Ameritech Michigan and GTE North Incorporated*, Case No. U-11756 (after

remand), Opinion and Order 2004 Mich. PSC LEXIS 65 (March 16, 2004) (partial denial)

- Massachusetts Department of Telecommunications and Energy, *Investigation by the Department of Telecommunications and Energy on its own motion regarding (1) Implementation of Section 276 of the Telecommunications Act of 1996 relative to Public Interest Payphones, (2) Entry and Exit Barriers for the Payphone Marketplace, (3) New England Telephone and Telegraph Company d/b/a NYNEX's Public Access Smart-Pay Line Service, and (4) the rate policy for operator service providers*, D.P.U./D.T.E. 97-98/97-18 (Phase II), Order (June 23, 2004)
- Mississippi Public Service Commission, *Complaint of the Southern Public Communications Association for Refund of Excess Charges by BellSouth Telecommunications, Inc. Pursuant to its Rates for Payphone Line Access, Usage, And Features*, Docket No. 2003-AD-927, Order (Sept. 1, 2004)
- Public Utilities Commission of Ohio, *In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI (Sept. 1, 2004)
- Florida Public Service Commission, *Petition for expedited review of BellSouth Telecommunications, Inc.'s intrastate tariffs for pay telephone access services (PTAS) rate with respect to rates for payphone line access, usage, and features, by Florida Public Telecommunications Association*, Dkt. No. 030300-TP, OrderNo. PSC-04-0974-FOF-TP (Oct. 7, 2004)
- Vermont Public Service Board, *Investigation into Public Access Line Rates of Verizon New England Inc., d/b/a Verizon Vermont*, Dkt. No. 6882, Order (Oct. 21, 2005)

B. State Courts

1. Refunds granted

- *Bell South v. Tennessee Regulatory Authority*, 98 S.W.3d 666, 666-670 (Tenn. Ct. App. 2002)
- *Kentucky Payphone Association, Inc., v. Public Service Commission of Kentucky*, Order, Civ. Act. No. 03-CI-00797 (Ky., Franklin Cir. Ct., Nov. 23, 2004) (refunds ordered back to Jan. 31, 2002).

2. Refunds denied

- *Independent Payphone Association of New York v. Public Service Commission of the State of New York and Verizon New York, Inc.*, 5 A.D.3d. 960, 774 N.Y.S.2d. 197 (2004)

- *Illinois Public Telecommunications Association v. Illinois Commerce Commission*, No. 04-0225, Order (App. Ct. Ill., 1st Dist., November 23, 2005).

APCC'S POSITION ON THE MERITS OF THE NST REFUND ISSUE

I. THE SECOND WAIVER ORDER REQUIRED REFUNDS WHEREVER BOCS WERE ALLOWED TO BEGIN COLLECTING PAYPHONE COMPENSATION BEFORE COMPLYING WITH THE NST

- *Was NST compliance a pre-condition to the BOCs collecting dial-around compensation?*
 - *PSP position:* Yes.
 - *BOC position:* No.
 - *Why the PSP position should prevail:* This point was settled long ago by the clear language of the Commission's 1996 and 1997 orders.
- *Which rates are subject to the Second Waiver Order's refund requirement?*
 - *PSP position:* The *Second Waiver Order* applied wherever a BOC made a compliance filing after the waiver was granted.
 - *BOC position:* The *Second Waiver Order* applied only where BOCs specifically proposed new payphone line rates, and only to the rates they proposed to change.
 - *Why the PSP position should prevail:*
 - The BOCs were allowed to begin collecting dial-around compensation and thus received the benefit of the waiver wherever they made a compliance filing by May 19, 1997, regardless of its content. To require BOCs to pay refunds only if they proposed to reduce their rates would unfairly penalize BOCs that sought to comply while rewarding BOCs who did not seriously attempt to comply, but instead left non-compliant rates in effect. The *Second Waiver Order* rationally sought (1) to protect all BOCs whose existing rates might not comply with the NST on the date of the waiver and (2) to protect PSPs and the public from regulatory delays that could prolong inflated payphone line rates in violation of the *Payphone Orders*.
- *To what time periods does the Second Waiver Order refund requirement apply?*
 - *PSP position:* The waiver and refund requirement applies to the period from April 15, 1997 until the date that NST-compliant rates took effect.
 - *BOC position:* The waiver and refund requirement applied only to the period between the original compliance deadline, April 15, 1997, and the post-waiver filing deadline, May 19, 1997.

- *Why the PSP position should prevail:*
 - The *Second Waiver Order* required BOCs to pay refunds “if newly tariffed rates, *when effective*, are lower than the existing rates.” Refunds are required if the rate that actually *became effective* after review by the state public service commission in accordance with the correct standard was lower than the existing rate.
 - The rate *filed* on May 19, 1997, was not automatically the NST-compliant rate; it was only the rate the BOC *claimed* to be NST-compliant. Frequently the filed rate was ultimately found to be non-compliant. If the Commission had cut off the refund as of the May 19 filing date and based the refund on the filed rate, PSPs would not be protected from continuing to pay inflated rates.
 - The 45-day period in the *Second Waiver Order* was a limitation on the BOCs’ right to collect dial-around compensation without having non-compliant NST rates; it did not limit the BOCs’ obligation to pay refunds. The intent of the 45 days was to ensure that BOCs acted promptly to correct their rates. The purpose of the refund was to ensure that, even after the waiver expired, non-compliant BOCs could avoid losing eligibility for dial-around compensation, by effectively ensuring that they were (retroactively) compliant as of April 15, 1997. Making the 45 days a limitation on refunds would have encouraged the BOCs to delay compliance, the exact opposite of the order’s intent. Moreover, it would mean that BOCs with non-NST-compliant rates would not be protected from being subsequently found ineligible for dial-around compensation.

II. EVEN WITHOUT THE SECOND WAIVER ORDER, REFUNDS ARE REQUIRED BY FEDERAL LAW

- *Non-compliance with the NST violated Section 276(a) of the Act and the Payphone Orders.* Refunding excessive charges is the normal remedy for unlawful carrier charges. Where a carrier has been found to assess charges in violation of rules issued by the Commission to prevent discrimination, PSPs have a right to claim refunds of the excess charges.
- Requiring the BOCs to refund the excess line charges unlawfully collected is preferable to the alternative remedy – requiring the BOCs to disgorge the compensation that they collected when they were not eligible to do so.
 - Refunding to interexchange carriers (“IXCs”) the dial-around compensation collected while a BOC was ineligible would be far more onerous to the BOCs than refunding the excess payphone line charges, and would provide an undeserved windfall for IXCs. By contrast, a

refund of excess line charges would return to PSPs money that they should never have had to pay in the first place.

III. THE FILED RATE DOCTRINE HAS NO IMPACT ON THE REFUND OBLIGATION

- In requesting waivers, the RBOCs expressly waived any filed rate doctrine claims.
- The *Payphone Orders* adopted federal regulations and the *Second Waiver Order* imposed federal conditions for waiver of a federal requirement. The filed rate doctrine that the RBOCs are asserting is founded on state law. Even if otherwise applicable, the state filed rate doctrine cannot block federally mandated refunds.